IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 75-5014

JEFFERSON DOYLE

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FIFTH JUDICIAL DISTRICT OF OHIO

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Jefferson Doyle, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on April 25, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entires by the Supreme Court of Ohio, denying further review are attached hereto as Appendices "A" and "B", infra, at pages 29 and 30. The entry filed by the Ohio Court of Appeals, the judgment to which this petition is directed, is attached hereto as Appendix "C", infra, at page 31. The entry of the Court of Common Pleas is Appendix "D", at page 47.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 25, 1975. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3), on the basis that rights, privileges, and immunities under the United States Constitution are contended to have been violated.

STATEMENT OF QUESTIONS INVOLVED

1) Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:

   a) to questions as to why he did not protest his innocence at the point of arrest, at the Preliminary Hearing, or at some time earlier than at the trial;

   b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;

   c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.

2) Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?

3) When the prosecution's case rests almost exclusively on the testimony of a paid informant, who was in quest of some leniency insofar as a sentence then pending against him was concerned, can the Court properly refuse to give the jury special cautionary instructions on the unreliability of witnesses of this ilk?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Revised Code, Section 3719.44(D):

"No person shall sell, barter, exchange, or give away, or make offer therefor, any hallucinogen except in accordance with sections 3719.40 to 3719.49, inclusive, of the Revised Code."

STATEMENT OF THE CASE

Jefferson Doyle was convicted in this cause for an alleged violation of the State's Narcotics Drug Law. More specifically, the charge stated that on or about April 29, 1973, petitioner sold marijuana to another in violation of P.C. of Ohio, §3719.44(D). Following his conviction on this single count, he was sentenced to the Ohio Penitentiary. This judgment was appealed on questions of law to the Court of Appeals for the Fifth District of Ohio, where it was affirmed. The Supreme Court of Ohio denied leave to appeal. This action is a result of the judgment of the Ohio Court of Appeals.

The appeal in this cause (--that is, Court of Appeals Case No. 1108) and that of Richard Wood (Court of Appeals Case No. 1109) were heard and determined simultaneously by the Fifth District Court of Appeals. The entries made in both of the appeals thus are relevant for a correct assessment of the relevant finding made. For this reason both entries are attached to this Petition as appendices. (State v. Wood is Appendix "E" at p. 49.)

STATEMENT OF FACTS[1/]

I

Bill Bonnell, a convicted felon, with a record of considerable length, as well as an admitted liar, testified that he bought a quantity of marijuana from Jefferson Doyle.

The veracity of Bonnell's testimony, which will be discussed more fully herein, must be measured against facts

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1/ In this Petition (R--) refers to pages from the transcript of proceedings at the trial.

showing that he was a paid informer. In addition, he not only had every reason to lie, but also admitted that where lying was to his own best interest he would do so again (R 206,230).

The overall importance of Bonnell's testimony revolves around the fact that he is the only person other than Jefferson Doyle and Richard Wood who was present during the alleged transaction. None of the officers who testified, save Captain Griffin, even asserted that they had seen any transfer take place. More specifically, Kenneth Beamer testified that he did not see the actual transfer but that Detective White and Captain Griffin told him they had (R 20). Detective White, however, testified not only he did not see this (R 80,321 & 322), but added he never told Beamer he had (R 67).

As to Captain Griffin, although he could not see the alleged transfer when he testified at the Preliminary Hearing (R 362,363), at trial he indicated he had done so. This he maintained despite being 200 feet away, in the middle of the night, in a deserted parking lot surrounded by foliage. In addition to this, during a pre-trial motion, Griffin says he saw Bonnell go to the passenger side of the vehicle (R 97). It was at that time, according to him, Mr. Wood got in the car and then Bonnell received a package through the window. However, during the trial (R 345), this officer testified that a large sack was passed through the window to Bonnell and at that point the passenger in the pickup--that is, Mr. Wood--got out and walked around behind the pickup and got into the passenger side of the automobile.

To be sure, the record shows Griffin's testimony at trial conflicts with his testimony at the suppression hearing. Both of these, in turn, conflict with his testimony at the Preliminary Hearing and with the testimony of Bonnell to the effect that he received the package through the window on the driver's side. In any event, it should be noted that there is no mention ever that petitioner Doyle moved over from the driver's seat to the passenger window in order to accomplish the feat of handing out the package.

Synthesized, if the testimony Captain Griffin first gave (R 97) is to be believed, Doyle could not have passed the package because Wood would have been between Doyle and Bonnell. So structured, it would have had to have been Wood who passed the package to Bonnell through the passenger window to the informer.

Of course, all this, including Griffin's testimony, conflicts with Bonnell's testimony, which was that he got out of the pickup and went around the front of the car where Doyle passed the contraband through the window on the driver's side of the car (R 164). It is obvious, therefore, on this point that one or both of the witnesses were less than honest.

To further shed light on the veracity of these witnesses, it should be pointed out that in the testimony of Bill Bonnell (R 242), he admitted having discussed with the officers, in detail before the trial, which side of the truck he had gotten out of and generally reviewed with them what had allegedly transpired. This obviously accounts both for the apparent failure of these officers to give a consistent version initially, and for Griffin's contradictory and unrehearsed version at the Preliminary Hearing on this point (R 362). The simple explanation is that they did not see the transaction take place.

Again, the State's case was dependent upon the testimony of a paid informant and convicted felon, Bill Bonnell. As such, his veracity and the ulterior motives behind his actions were extremely important. It must be re-emphasized that this was the testimony of a convicted felon, sentenced to the Ohio Penitentiary, desperate to do anything to get out--even turn in his childhood friends and lie (R 206)--so that certain officers would come forward in his behalf at his shock probation hearing that was then pending. He also admitted that he would not testify but for the threat of prosecution for additional crimes against him if he failed to do so (R 230).

Capsuled, it was Bonnell's testimony that he was contacted by Jefferson Doyle relative to a transaction for the sale to him of a quantity of marijuana. In response to this, they agreed to meet at a tavern in Dover.

He then contacted the authorities. In league with them, he testified to the preparations made to keep him under surveillance during the proposed transfer.

His evidence further showed that following the initial rendevous in Dover, he and Wood, in his truck drove to New Philadelphia where they waited for Jeff Doyle, who according to him left to get the merchandise. He then testified the substance was transferred to him by Doyle.

He admitted that later he did contact Marinelli, and through him arranged to meet with either Doyle or Wood. Also, it was his testimony that a meeting did take place at the Delphian Inn. Present at this time were Mr. James, Wood's attorney, Wood and Marinelli.

Prior to trial, the Court denied a motion calling for the suppression of certain physical evidence seized in this case. The property sought to be suppressed had been seized from the Wood vehicle on the basis of a search warrant issued following the arrests of Doyle and Wood. These arrests had occurred in New Philadelphia shortly after they were observed in the parking lot where Bonnell says the contraband was turned over to him.

The crucial property seized from the car was the money that had been supplied Bonnell, and which in turn was allegedly given to Doyle in exchange for the marijuana.

II

For his defense, Doyle testified that while he was in an Akron bar, he overheard a casual conversation in which one Vince Cercone, a resident of New Philadelphia, had mentioned that Bill Bonnell was dealing in marijuana (R 465). As Doyle recalled the events, Richard Wood, who was also present, indicated he was going down to Steubenville to see his daughter (R 467). Doyle says he then asked Wood if he would drop him and his wife off at Doyle's sister's home and pick them up on his way back. Doyle's sister, the evidence shows, lived in Sherrodsville (R 469).

Having decided to come to this area, Doyle says he then called Bill Bonnell, whose number he obtained from a Jim Russell who also lives in this area (R 467). In talking to Bonnell, Doyle stated he first asked if he was dealing in marijuana. Upon receiving the proper indication, he then asked Bonnell to make a sale to him (R 468). This then prompted Bonnell to say they could meet that night at a named bar in Dover (R 468).

After Doyle had picked up his wife, they proceeded to Doyle's sister's house in Sherrodsville. There the wife

was dropped off and they made their way to Dover when Doyle met with Bonnell.

In recalling his conversation with Bonnell, Doyle testified:

A I started talking to Bill and I -- about buying some marijuana and he said he had some. I asked him how much, and he said it was $175.00 a pound. If I'd take them all, he'd make me a deal. I believe his first offer was $1200.00 for all of them and I thought about it, then he said maybe he could even do it for $1000.00, and I said, --'I don't know if I can get the money." He said -- 'Well, what can you come up with?' I said, - 'I got to go out and see how much money my wife had.' and I was figuring then she had about $130.00 or $140.00. I had Forty some dollars on me and I knew that Woody had some money on him, and I knew that if I asked for it, Woody would trust me to loan it to me because he knows I'd pay him back.

Q Do you know how much money Woody had on him?

A I don't know exactly but I knew it was right around $1,000.00.

Q Then, what happened?

. . . . . .

A I was going to go out to my sister's house to see if I could get the money to buy all ten pounds. I started out to my sister's. I told Bill, you know, -- 'Where can we meet later?' Bill said, -- I said, -- 'Do you want me to come back here?' He said, -- 'No, I'll meet you behind Club 224.' I said, -- 'Okay.' So I started out to my sister's and I got to thinking, -- 'What am I going to do with it?', -- you know, with that much marijuana.

Q Let me ask you, Mr. Doyle, -- do you smoke Marijuana?

A Yes Sir. I have.

Q How long have you been smoking Marijuana?

A First time I smoked it is when I was sixteen years old.

. . . . . .

Q So when you came to Dover, you were looking for some marijuana to smoke. Is that right?

A Yes Sir.

Q Now, after, you say that you went out to see if you could get your money at your sister's house, what happened at that point, when you started out to your sister's house?

A I didn't know what I was going to do with that much marijuana.

Q What happened?

A I changed my mind and decided to go back and see if I could buy one pound.

Q Then what happened?

A I turned around and came back.

Q Came back into New Philadelphia?

A Yes Sir.

. . . . . .

Q Tell us that happened when you got back in behind the Club?

A I was sort-of scared and I was looking around and didn't see nobody and Bill came up to the side of my truck, - or my car, -- He came from his truck up to the side of my car and he said, --'Did you get the money?', and I said, -- 'I can't get that much money but I only want to buy one pound.' He said, -- 'Why did you tell me you wanted it all?' I said, -- 'Well, I wanted it all but I don't know what I'm going to do with it and I don't know anybody to get rid of that much to.' He said, -- I believe he got upset about it because he said he didn't want -- if I only wanted one pound, why didn't I say so, so he'd only brought one pound. Something of that nature. That's how the conversation went. I can't say word for word because I was nervous at the time.

. . . . . .

Q At that point, when you indicated to him you only wanted to buy less than all of this, what did he do? Mr. Bonnell?

A He said, -- 'Forget it.' He said something else. He was pretty upset about it. Then he went around and got back in his truck.

Q Incidentally, was the window down on your car?

A Yes.

Q The car you were driving?

A Yes Sir.

Q Then what happened?

A He went around and got in his truck and Woody, -- I guess at the same time, it seemed like, - Woody came around and got in the car.

Q When Woody got into the car, what do you recall happening?

A That's when Woody asked me what the money was doing in the back seat. I didn't know there was money in the back seat. Apparently, Bill threw it in there. I didn't even know it was there til that time (R 470-475).

Distilled, Doyle's testimony was to the effect that he had been framed. And, that it was because he sensed this to be the case, he then drove through the streets of New Philadelphia looking for Bill Bonnell. It was during this period they were seen by the police and were later arrested.

During his cross examination the prosecutor, with the expressed approval of the Court, asked Doyle if he was innocent. Receiving an affirmative response he then asked him the rhetorical question, "That's why you told the police... about your innocence?" (R 504). This question, after the judge's prejudicial contribution to its effect, caused him to reply, "I didn't tell them about my innocence. No", and that he did not tell them he had been set up, nor did Wood (R 504-505).

Not satisfied with these responses, and apparently inspired on both by the Court's apparent unwillingness to protect Doyle against being penalized for having exercised his rights at the point of arrest, and to further prejudice the defense with the jury, the prosecutor, in his quest for a conviction, pressed on. At this point, he asked Doyle whether the arresting officers had asked him if they could search. When given the response that it was not his car, the prosecutor just had to inquire "why didn't [he] consent to a search" (R 505), why didn't he protest his innocence at the time the car was searched, and why didn't he protest his innocence at the Preliminary Hearing after he heard the accusatory testimony of the officers (R 507-508). Even this is not all, he forced Doyle to admit the first time he (Doyle) had given his version of the facts was during his testimony at the Wood trial (R 508).

Richard Wood also testified as a defense witness, as did a Louis Marinelli. Wood's evidence was to the effect that he had absolutely nothing whatsoever to do with any transaction between Bonnell and Doyle. Further, that he was, as Doyle testified, en route to Steubenville to visit his family (R 444). His evidence, which agreed with Doyle's, was that when he entered the car, behind the club (R 224), he spotted the money "on the back seat" (R 450). Following this he says he gathered it up.

According to this witness, they started chasing Bill Bonnell after Doyle remarked, "he had been had" (R 451).

Wood, too, was asked if he had told the police he had been set up (R 455). Wood was further questioned as to whether he had taken the "witness stand" and told the judge (at the Preliminary Hearing) he had been set up (R 456).

Consider, also, on this same point, the following almost unbelievable segment of the record:

Q So upon your arrest, you didn't tell anybody you had been 'set up' and why you were chasing Bonnell?

. . . . . .

A No Sir.

Q And you didn't testify in your own defense at the Preliminary Hearing prior to indictment in this case?

A No Sir.

Q And you didn't testify in your own defense at the Preliminary Hearing prior to indictment in this case?

A No Sir.

. . . . . .

Q So the first time you testified as to the facts in this case was at your trial?

. . . . . .

A Yes Sir. (R 457-458).

The fact that each of these questions was objected to really magnifies our problem.

III

Following the close of all the evidence the defense renewed the various motions made at the close of the State's case. These included the Motion for Judgment of Acquittal that had been summarily denied (R 510, 422). Also denied were certain special instructions. The most crucial of these, and the two which we claim it was prejudicial for the Court not to at least incorporate in its general charge were Nos. 1 and 2. Specifically, these instructions, as submitted, stated:

1. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by his interest, or his prejudice against defendant.

2. In this case William Bonnell, according to his own testimony is a self-confessed criminal and is currently under sentence for several criminal acts. If you believe Mr. Bonnell was induced to testify in this case by any promise of immunity or that any hope was held out that he would be rewarded or in some way benefited if he implicated the defendant in the crime charged herein, or if he believed he would so benefit even if no such promise were made, then you may consider such fact in determining what weight should be given to his testimony.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

I

The Assertion Of A Constitutional Privilege Is Not Properly Part Of The Evidence To Be Considered By The Jury, And No Inference Can Be Legitimately Drawn By The Jury As A Consequence Of A Witness Having Exercised This Right.

No one except perhaps an overly zealous "law and order" advocate in some alien society would ever contend that when one exercises his constitutional rights he does so under the threat that he can be penalized thereby. Why this is so could not be more obvious. For, to be sure, this Court, in a number of cases, has effectively concluded that to penalize the exercise of a constitutional privilege would make a mockery of the Constitution.

The factual background for our contentions, at this juncture, shows our petitioner was asked: (a) if he

told the police his defense when he was arrested (R 504,505,507); (b) whether he consented to a search of the car (R 505,506); (c) whether he told the Court at the Preliminary Hearing his defense (R 508); and (d) whether he ever revealed his version of the events prior to testifying in the trial of his co-defendant (R 508).

Wood, a defense witness, was asked, and compelled to answer, over vigorous and persistent defense objections: (a) whether he protested his innocence at the point of arrest (R 455,456,457); (b) whether he told the Court at the Preliminary Hearing his defense (R 456-457); and (c) whether he ever revealed his version of the events prior to testifying in his own trial (R 458).

Also, the record shows, the prosecutor with the avid support and sanction of the Court, argued most, if not all, of these points to the jury (R 515, 526-527).

Given the aggressive tenor of the prosecutor's questions, designed to show (as they did) that Doyle did not either at the point of arrest, or any other time prior to testifying, personally reveal his defense; if it is determined these questions were improper, then there can be no valid contention that they were harmless. However, even if it were possible to view the mere asking of such questions as harmless, the fact that the trial judge aggressively sanctioned them, greatly magnified the prosecutor's final argument, and compounded these abuses of due process.

Viewed in still another sense, if the questions asked, and the argument made, had not been developed with a full and complete awareness of the Ohio Supreme Court's decision in State v. Stephens, 24 Ohio St 2d 76 (1970), then we could at least attempt to rationalize his having committed these faux paus. But the fact is, these same tactics were employed in the companion case (State v. Wood) and the prosecutor was furnished in that case with the citation to Stephens. Stated another way, it has to be, if our contention that these questions and the argument were improper, that it was done willfully.

It would seem that the mere citation of Miranda v. Arizona, 384 U.S. 436 (1964), as authority for the proposition that Doyle was under no obligation to make any statements should suffice. If then he was under no obligation to make any statement, it perforce follows he could not be penalized for having exercised this right. This being the case, the prosecutor's argument has to be regarded as an effort to create evidentiary value out of this circumstance.

At least as to the argument aspect of our position here, our Supreme Court's decision in State v. Stephens, supra, appears to be on all fours with this case. In Stephens, the Court was dealing with a factual pattern which showed the prosecutor arguing, "Why did he not tell the police at the shopping center, 'Hey... look this prescription that you found, this is a good one... Why didn't he tell the police?" An objection made to this argument was overruled. Under these circumstances, that Court concluded that, "Obviously such action has a prejudicial effect, and to allow such comment would completely circumvent an accused's privilege against self-incrimination."

More precisely to the point is the Court's reference in Stephens, to State v. Davis, 10 Ohio St 2d 136; 226 NE 2d 736 (1967), which refers specifically to the prosecutor's comment upon the defendant's refusal to testify at a Preliminary Hearing. In that case, too, comment by the prosecutor

concerning defendant's refusal to testify at the Preliminary Hearing, was held to be prejudicial error.

Also, as to the propriety of the questions directed to Doyle relative to his not having disclosed his defense at the Preliminary Hearing, the decision of State v. Minamyer, 12 Ohio St 2d 67, 232 NE 2d 401 (1967), provides an almost perfect analogy. In the Minamyer case, the Court specifically dealt with the question as to "whether the prosecuting attorney during the trial of an accused may... comment upon the... accused's refusal to testify before the Grand Jury." there, the Court held that to allow a prosecutor to

> "comment upon the refusal of an accused to testify before a grand jury would have equally prejudicial effect and to allow such comment would completely circumvent an accused's constitutional privilege against self-incrimination. Therefore, in a criminal prosecution a prosecuting attorney may not testify as to or comment upon the refusal of the accused to testify before the grand jury." (Id, 232 NE 2d, at 403.)

The fact that the Minamyer decision went on to hold that the instructions given to disregard this gross impropriety did not cure the error, aggravates the wrong in our case where it was committed with the fullest possible judicial sanction.

The reasons argued above (and specifically assigned below as errors and numbered 5, 6, 7 and 8) surely qualify as valid, and as such were sufficient to entitle this petitioner to a new trial. But this was not to be, as the Court of Appeals took the very strange position that the assailed cross examination was proper because the resultant disclosures, all of which were argued to the jury, had a proper bearing on the credibility of the witness and the accused. Even more strangely, the Supreme Court of Ohio refused to review his specific holding.

As to this expressed position (which is consistent with the one argued by the State below), Harris v. New York, 401 U.S. 222 (1971) is said to have sanctioned the forced disclosure that the right of silence and that of counsel had been exercised (Answer Brief, p. 17).

To begin with, the fact that an accused has a right to counsel and to remain silent not only following his arrest but while he is in custody is beyond dispute. Constitution of the United States, Amendment V; Miranda v. Arizona, 384 U.S. 436 (1966). A corollary of this principle is the proposition that the prosecution is not permitted to impermissibly burden, or otherwise penalize one for having exercised either of these rights. Griffin v. California, 380 U.S. 609 (1965).

Given the view expressed in Harris v. New York, to the effect that "prior inconsistent... and conflicting statements" obtained in violation of the Constitution (and this would include, as the State sees it, the failure to consent to a search of the car) can be used for the limited purpose of impeachment at the trial; the question then is the assertion of these rights inconsistent with innocence.

In Gruenwald v. United States, 353 U.S. 391, 415-424 (1957), this Court expressly held that a prior assertion of the right of silence was not inconsistent with a later assertion of innocence (id, at 423-424). Other cases approving this approach have made the point that an accused cannot be penalized for exercising his right of silence (Fowle v. United States, 410 F 2d 48 [1969]), and for the additional reason that a comment on an accused's failure to speak out

at the point of arrest, or while in custody operates to punish him for availing himself of the right of counsel. Fagundes v. United States, 340 F 2d 673, 677-678 (1965).

Given these holdings, it is apparent that Harris v. New York simply does not apply to this case. But even this is not all. Simply holding that Harris is inapplicable to these facts is only the short answer. The position taken by the Court of Appeals on this point is intrinsically unsound for other cogent reasons. Not the least of which is the fact that even if reliance on these rights were inconsistent with innocence, and that such could be shown for the limited purposes indicated by the Court of Appeals, the fact that no limiting instructions were given becomes a factor.

But again, it must be that the law here that silence following an arrest is not inconsistent with innocence, being rather the simple exercise of a right to which all are entitled without qualification. See Gillison v. United States, 399 F 2d 586 (1968). If this is not the case then the Miranda warning in Ohio should be changed so as to inform an accused that he has the right of silence and to counsel, but that if he waives them anything he says can be used against him. Further, that if he fails to waive them then the fact that he did so could also be used against him. McCarthy v. United States, 25 F 2d 298 (1928). Also see United States v. McKinney, 379 U.S. 259 (1967).

II

Where The Prosecutor's Case Rested Almost Exclusively On The Testimony Of A Paid Informant (Who May Have Been An Addict At The Time Of The Alleged Occurrences And At The Time Of Trial), The Accused Is Entitled To Cautionary Instructions On The Unreliability Of Testimony By A Witness Of This Ilk.

In this case, a serious dispute existed as to whether there had in fact been any purchase or sale of marijuana. Hence, the question, simply put, was whether the paid informer and convicted felon, Bill Bonnell, had indeed testified truthfully as to his asserted dealings with Jefferson Doyle.

Since there was no meaningful corroboration for any of Bonnell's testimony, the jury was required to decide if Bonnell could be believed beyond a reasonable doubt.

Most courts, of course, recognize the serious credibility questions inherent in the use of informers. Doubtless it was this reason, and to make sure that witnesses of this type were properly identified as such, that led this Court, in On Lee v. United States, 343 U.S. 747 (1952), to state:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may weigh serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to prove the credibility by cross-examination and to have issues submitted to the jury with careful instruction."

Thus, where, as here, the informer's incriminating testimony is uncorroborated or unsubstantiated, in its critical aspects, special cautionary instructions are required. See Orebo v. United States, 293 F 2d 747 (1961), and Joseph v. United States, 286 F 2d 486 (1961).

A further aspect of this issue as presented here involves the restrictions placed on the defense examination of Bill Bonnell as to his possible drug dependence. This dependence, if shown, could have been of extreme importance in evaluating this witness' credibility. In this regard, the following segment of the record is significant:

(By Mr. Willis)

Q You used drugs, didn't you?

MR. CUNNINGHAM: Objection, Your Honor.

THE COURT: Sustained.

Q Mr. Bonnell in your life have you ever used narcotics?

MR. CUNNINGHAM: Objection.

THE COURT: Sustained.

Q You know what narcotics is, don't you?

A Yes.

Q Now specifically referring to benzedrine, do you know what that is?

MR. CUNNINGHAM: Object, Your Honor, we are talking about 10 lbs. of marijuana.

MR. WILLIS: We are talking about his credibility too.

THE COURT: Objection will be sustained.

Q Did you ever testify that you use narcotics, Mr. Bonnell?

MR. CUNNINGHAM: Objection!

Q Isn't it a fact that you testified that you used --

MR. CUNNINGHAM: Objection!

MR. WILLIS: (Continuing) Benzedrine?

MR. CUNNINGHAM: Object!

THE COURT: It appears irrelevant unless it can be shown otherwise the objection will be sustained. (R 178).

As evidenced by the position taken by the prosecutor and sanctioned by the Court, a possible addict-informer is to be protected from exposure of the fact of any drug dependence. The propriety of this view thus becomes an essential aspect of this branch of our argument. For, if we were entitled to explore this avenue, then it was surely prejudicial for the Court to deny us that opportunity.

While there are no Ohio decisions dealing directly with this rather sophisticated issue, the rather recent decision of United States v. Kinnard, 465 F 2d 566 (1972), seemingly must be reckoned with. Here, the D. C. Circuit Court held that the drug dependence by a witness is a legitimate area for exploration and that it is prejudicial for a court to disallow even the development of a basis for the introduction of extrinsic evidence to prove addiction or dependence.

Essentially, at this juncture, it is being contended that defense counsel was prohibited from showing that the witness Bonnell was dependent upon drugs both at the time of the alleged transaction and at the time of trial.

In this case, of course, there was little if any corroboration for Bonnell's version. However, even where the informant's testimony is corroborated, many jurisdictions favor instructions which are calculated to call the jury's attention to the inherent untrustworthiness of these informer witnesses. The sufficiency of any instructions depends upon the circumstances that tend to corroborate the informer. In

Fletcher v. United States, 158 F 2d 321 (1951), the court held that,

> "granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his tesitmony, the jury should be instructed to scrutinize it closely for the purpose of determining whether it is colored in such a way as to place guilt upon the defendant in furtherance of the witness' own interest. Here... the usefulness of the witness--and for which he received payment--dependent wholly upon his ability to make out a case. No other motive than his own advantage controlled him in all that he did. Because of this, it was necessary to give special cautionary instructions on his unreliability. Failure to give these instructions is reversible error unless the informer's testimony is fully corroborated by other eyewitnesses." (Emphasis added.) Also see Hardy v. United States, 343 F 2d 233 (1964).

Here, since Bonnell's testimony was virtually uncorroborated in any of its material aspects, the necessity for the special instructions was critical. It was stated in Kinnard, supra, that:

> "The trial court should be prepared to caution the jury to weigh with extreme caution the testimony of an addict informer that is uncorroborated in some material respect, because of the possibility of the addict's special interest and motive to fabricate." (465 F 2d, at 572.)

The Court further stated that extrinsic evidence of addiction is not collateral but that it goes to the motive of the informer to lie. This further bolsters petitioner's argument that the scope of the cross-examination should not have been stymied. (Other cases that have considered the propriety of instructions on this point include United States v. Griffin, 382 F 2d 823 [1967]).

However, our position with reference to the Court's failure to give any cautionary instructions is not dependent on the analysis given above. Doyle's entitlement to an instruction, pure and simple, was based on the inherent untrustworthiness of informers, especially those who become such for ulterior motives. It is beyond dispute that informers of this type create a special problem that jurors must be made aware of.

Further background for our position is supplied by the fact that the special instructions tendered the Court would have focused in a meaningful way on the testimony of this informer.

In order that the real depth of this issue be determined, the following specific testimony brings to bear the importance of the requested instructions and why their rejection was so prejudicial:

(By Mr. Willis)

Q At least, we have established that you will lie?

A I have lied. Yes.

Q You will lie in the future if it serves your own best interests, wouldn't you?

A Possibly.

Q Probably?

A Possibly.

Q It's only possible that you would lie?

A Yes.

Q It would serve your interests, at least you thought so, in April, if you could prove your invaluable assistance to the Narcotics Squad in ridding the community of drugs, wouldn't it?

A Yes, it would.

Q Yes, and it would be a bigger feather in your cap if you could capture dope, a big sale, than it would be if you just caught somebody with a couple of lids, or a few joints, wouldn't it?

A Yes.

Q Right. And you knew that your chances of going back to the Penitentiary at that time, were pretty good since the Court of Appeals affirmed your conviction, you knew that, didn't you?

A Right. Yes (R 205-206).

In a similar vein the following testimony of Bonnell is also relevant:

(By Mr. Willis)

Q Just before these trials started, you were told, weren't you, that if you didn't come to Court and testify the way you had stated this thing happened to the officers, that they would charge you with obstructing justuce [sic], and a number of other things.

A Yes.

Q So they threatened you. The officers?

A Yes. -- No, it wasn't the officers. It was the Prosecuting Attorney that I talked to.

Q Well, he threatened you?

A He told me if I refused to testify, I would be charged with obstruction of justice, among other things.

Q That's a threat, isn't it? Or is it a promise?

A It's probably a promise.

Q So you're testifying under the cloud of the Prosecutor's promise that if you didn't testify as you stated, originally, this incident occurred, you'd be charged with Obstructing of Justice. That's right, isn't it?

A Yes.

Q And you told us that you would lie if it was in your best interest to do so?

A Right.

Q Right. So that it would be in your best interest to lie, to avoid being charged with Obstructing Justice and a number of other things. Right?

A Yes (R 229-230).

It is glaringly apparent from this testimony that the special cautionary instructions were required, as all the underlying reasons justifying such instructions were surely present here regardless of whether Bonnell was an addict. However, the fact that cross-examination as to his possible drug dependence was curtailed is but another reason such instruction should have been granted. Thus, the failure of the trial court to allow such examination only compounded the injury to the appellant.

Concededly, the court was under no obligation to give the requested instructions in the language submitted by counsel. However, the Court was at least required to incorporate the type of instruction to which the request related in its general charge. The Court's failure to do this made our Assignment of Error No. 9, to which this argument was addressed valid. The same validity label should have applied to Assignment No. 3, as the Court's curtailment of our cross examination of Bonnell simply cannot be defended.

CONCLUSION

In this case, the Court permitted the prosecutor to argue that, "If you don't feel that we, representing the State of Ohio, proved our case 'beyond a reasonable doubt,' it is your duty to acquit this defendant, but to do so, you are going to have to disbelieve [Officers] Griffin, White, Beamer, [and] me" (R 527).

Given the fact that the prosecutor was not a witness, something has to be wrong with this type of argument

which so obviously added to the weight of the case against this accused the prestige of the prosecutor in the small town of New Philadelphia, Ohio, where this case was tried. The fact that this gross impropriety was done subtly, does not diminish the fact that it had to be deliberate. See State v. Thayer, 124 Ohio St 1 (1931).

Stated another way, the prosecutor's "personal status [in this community] and his role as spokesman for the government tend[ed] to give what he [said] the ring of authenticity... tend[ing] to impart an implicit stamp of believeablity." Hall v. United States, 419 F 2d 582 (1969).

But, of course, this substantial flaw in Doyle's conviction is meager compared to the other wrongs by which he was victimized.

Given this Court's decision in United States v. Hale, ___ U.S. ___ (decided only yesterday, hence not in time for a more amplified inclusion in this Petition, because of the deadline for filing prevented a rewriting of this Petition); it seems clear our case, and the companion case of Wood v. Ohio, ought to be considered by this Court on its merits. For not only did we have here questions and comments on the exercise of the right of silence, but the right to consult counsel too was commented on; as was the fact that petitioner and his co-defendant did not consent to the search of their car.

Since this Court obviously was not persuaded in Hale to alter the Miranda formula to read that "if you say anything, it will be used against you; if you do not say anything that will be used against you" (McCarthy v. United States, 25 F 2d 298 [1928]), it seems only right that the Hale approach should be applied here.

For all of these reasons, it is hereby urged that the conviction herein should be reviewed.

Respectfully submitted,

JAMES R. WILLIS, ESQ.
Attorney for Petitioner
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of Ronald L. Collins, Prosecuting Attorney, Tuscarawas County, County Courthouse, New Philadelphia, Ohio 44663, this 26th day of June, 1975.

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*75 *TERM*

To wit: April 25, 1975

State of Ohio,
Appellee,

vs.

Jefferson Doyle,
Appellant.

No. 75-177

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for TUSCARAWAS *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by James R. Willis

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

BARRETT PRINTING, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*75 *TERM*

To wit: April 25, 1975

State of Ohio,
Appellee,

vs.

Jefferson Doyle,
Appellant.

No. 75-177

APPEAL FROM THE COURT OF APPEALS

for TUSCARAWAS *County*

This cause, here on appeal as of right from the Court of Appeals for TUSCARAWAS *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for TUSCARAWAS *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

APPENDIX "C"

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO : JUDGES:
Hon. Norman Putman, P.J.
Plaintiff-Appellee : Hon. Leland Rutherford, J.
Hon. Paul Van Nostran, J.
vs. :
JEFFERSON DOYLE : CASE NO. CA 1108
Defendant-Appellant: M E M O
: Decided_____

APPEARANCES:

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Court House
New Philadelphia, Ohio 44663
Counsel for Plaintiff-Appellee

JAMES R. WILLIS
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Cleveland, Ohio 44114
Counsel for Defendant-Appellant

PUTMAN, P.J.

This is an appeal in a criminal action from a sentence for illegal sale of marijuana in violation of R.C. 3719.44(D). Appellant was jointly indicted with Richard Wood but tried separately. Wood's appeal is our separate case number 1109.

Twelve errors are assigned as follows:

1. The court erred in denying the appellant the opportunity to show that certain electors were improperly excluded in connection with jury service.

2. The court erred in failing to grant a change of venue.

3. The court erred in restricting the cross examination of the witness Bonnell as to his possible drug addiction.

4. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer.

5. The court erred in permitting the prosecution to interrogate the witness Wood in a manner suggesting his (--i.e.,Wood's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence", at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility as a witness.

6. The court erred in permitting the prosecution to develope through the testimony of both the witness Wood and the appellant, that they refused to consent to the search of the car.

7. The court erred in permitting the prosecution to develope, through the cross examination of the appellant, that he did not "protest his innocence" upon being arrested.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the appellant to protest his innocence, or to otherwise disclose his defense earlier than at the trial of Richard Wood, and that his failure to consent to a search of the vehicle, were circumstances that could be weighed arriving at a verdict in this case.

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special requests submitted by the appellant.

10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence.

11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law.

12. The prosecutor was guilty of misconduct in arguing to the jury his personal opinion as to the guilt of the appellant.

We find the State's evidence, if believed, was sufficient to show beyond a reasonable doubt the following as set forth in appellee's brief:

In April of 1973, William Bonnell, an informant of the Multi-County Narco Bureau and a convicted mine

rioter free on bond pending various appeals, made contact with a man by the name of Vincent Cercone, who told Bonnell he could set up or help set up a transaction for a large quantity of marijuana (as it turned out, 10 pounds). On the evening of the 28th of April, 1973, Mr. Bonnell got a telephone call from Jefferson M. Doyle proposing to sell Bonnell 10 pounds of marijuana for $175 a pound, or a total of $1750. Arrangements were made to meet in the Cloverleaf Tavern in Dover, Ohio. Bonnell reported this telephone conversation to the Multi-County Narco Bureau which then tried to gather $1750, but only succeeded in raising $1320. This money was photocopied so it could be traced. Bonnell then proceeded in his pickup truck to the point where he had prearranged to meet with Mr. Doyle. From and after the time Mr. Bonnell met Mr. Doyle and also Mr. Richard Wood in Dover, he was at that time and from then on under constant surveillance by an agent from the Multi-County Narco Bureau, Kenneth Beamer, Agent in charge of Multi-County Narco Bureau, Captain Jack Griffin of the Dover Police Department, Chief Deputy Hobert White of the

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Tuscarawas County Sheriff's Department and several others.

At approximately 12:30 to 1:00 A.M., Mr. Bonnell was seen by the agents and deputies conducting the surveillance, leaving the Cloverleaf Tavern and going across the street to Nickie's Tavern. Mr. Bonnell was then seen leaving this tavern in the company of Richard Wood. Mr. Doyle was at this time going to pick up the marijuana which was stashed in a culvert on Route 39. Bonnell and Wood got in Bonnell's truck and proceeded across Tuscarawas Avenue to New Philadelphia, Ohio. They parked the pickup truck on North Broadway just north of Beech Lane, near the Club 224 on North Broadway in New Philadelphia.

A very short time later the officers who conducted the surveillance observed a 1973 Oldsmobile Cutlass, driven by Jefferson Doyle, pulled up beside or to the rear of the Bonnell pickup truck. Mr. Doyle flashed his lights. The pickup truck proceeded into the rear of the parking lot of the 224 Club and both vehicles then were in the 224 Club parking lot. Captain Griffin, one of the officers conducting the surveillance,

observed Mr. Bonnell receiving a large brown paper bag through the window from Mr. Doyle and saw Mr. Wood get out of the pickup truck and get in the car with Doyle. At this time the parties separated and both vehicles turned right on Second Drive and proceeded North. The surveillance was continued and Doyle and Wood were followed on their route through New Philadelphia. A few minutes later Mr. Doyle and Mr. Wood were arrested for the sale of marijuana to Mr. Bonnell by Agent Beamer of the Multi-County Narco Bureau. In the meantime Mr. Bonnell had surrendered himself and the brown paper bag to the authorities. It was found to contain ten (10) pounds of cannabis sativa L. (marijuana).

After Doyle and Wood were arrested, Agent Beamer contacted Mr. Arthur B. Cunningham, Prosecuting Attorney of Tuscarawas County, for aid in preparing an affidavit for a search warrant, which warrant was approved by Judge Raymond C. Rice. This warrant was served and executed upon Doyle and Wood. Mr. Beamer, in the presence of Doyle

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and Wood, went to the place where the 1973 Cutlass had been stopped and under guard until the warrant was obtained, and searched the automobile. Mr. Beamer discovered, under the floor mat on the passenger's side of the car, a wad of money. The money was immediately examined by Mr. Beamer and checked against the list of money he had previously copied and he noted that it was the same money he had earlier given to Mr. Bonnell.

We consider each assigned error in turn.

1.

No "refusal to allow exploration into" the system of jury selection appears in the record. Appellant's counsel did not ask to "explore" or produce evidence. He made a brief legal argument respecting certain journal entries and concluded saying (R. 8):

"Thats all we have on that motion Your Honor."

2.

There is no error demonstrated respecting a failure to change venue. There is no record of the voir

dire examination of prospective jurors. The record says simply (R. 122 A):

"Thereupon a jury was duly impaneled and sworn."

This recital is conclusive upon us in the absence of an affirmative showing to the contrary. None has been made.

3.

Cross examination of the witness Bonnell respecting his possible drug addiction was not erroneously restricted. Appellant was represented by skilled counsel who abandoned this subject before he really ever got started upon it, after a few questions about past use of benzedrene. The court asked counsel to show relevance whereupon the inquiry was suddenly dropped. (R. 178, 179).

(By Mr. Willis)

Q. You used drugs, didn't you?

MR. CUNNINGHAM: Objection, Your Honor.

THE COURT: Sustained.

Q. Mr. Bonnell, in your life have you ever used narcotics?

MR. CUNNINGHAM: Objection.

THE COURT: Sustained.

Q. You know what narcotics is, don't you?

A. Yes.

Q. Now specifically referring to benzedrine, do you know what that is?

MR. CUNNINGHAM: Objection, Your Honor, we are talking about 10 lbs. of marijuana.

MR. WILLIS: We are talking about his credibility too.

THE COURT: Objection will be sustained.

Q. Did you ever testify that you use narcotics, Mr. Bonnell?

MR. CUNNINGHAM: Objection!

Q. Isn't it a fact that you testified that you used --

MR. CUNNINGHAM: Objection!

MR. WILLIS: (Continuing) Benzedrine?

MR. CUNNINGHAM: Object!

THE COURT: It appears irrelevant unless it can be shown otherwise the objection will be sustained. (R. 178).

The State's witness Captain Griffin, when cross examined by appellant's counsel respecting his surveillance of the "sale" (R. 362-3):

Q. Now, when you finally came to a stop, you said you saw the informant standing with a package under his arm?

A. Yes.

Q. Did you see where the package came from?

A. He was standing on the passenger side, -- driver's side of the automobile, and -- no, he came from the car but I couldn't see.

Thereafter, upon re-direct, (R. 371) the prosecutor asked him about a report (State's Exhibit 11) which Griffin then identified as the report of the transaction prepared by himself and Hobert White (R. 371 lines 6 & 7) and testified, in substance, that he said in the report what he had just said on the witness stand.

We find this was justified by the challenging manner of the cross examination. No error appears. See Harris v. New York, 401 U.S. 222 (1971).

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5.

Although Richard Wood was not on trial here, he testified as a defense witness for appellant Doyle. He gave a detailed narrative calculated to exculpate Doyle. He was cross examined by the prosecutor in such a manner as to demonstrate he had not told this story at his first or other earlier opportunities.

We find no error. This is proper cross examination bearing upon the credibility of the witness.

6.

Both appellant Doyle, after he testified on direct as a witness for himself in his own case in chief, and his co-defendant Wood who (although not then on trial) appeared as a defense witness, were cross examined in such a way as to develop the fact that upon first confrontation with the authorities they did not consent to a search of the car.

This was not a subject adduced by the state in its case in chief offered as substantive evidence of guilt but rather cross examination of a witness bearing upon the limited purpose of credibility. Concededly this could not have been shown in the states case in chief but used as it was on this state of the record for this limited purpose, it was not error.

7.

After the defendant-appellant took the stand and testified in detail as to a narrative of events he claimed to be exculpating, he was cross-examined by the prosecutor, in substance, as to why he did not give this same account when first confronted by the authorities (R. 504 - 508).

This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity.

We find no error in this. It goes to credibility of the witness.

8.

This assignment goes to the fact that the

prosecutor argued to the jury the facts he developed on the cross-examination of the defendant Doyle and his witness Richard Wood which have been discussed in assignments 5, 6 and 7.

There we held the matters were not improperly shown and here we hold they were not improperly argued to the jury.

9.

The ninth assignment of error complains of the refusal of the trial court to give the jury a "cautionary" instruction respecting the testimony of the witness Bonnell, a claimed participant in the illegal sale.

We find no error. In State v. Flonnory,(1972) 31 O.S. 2d. 124, the fourth paragraph of the syllabus reads:

> "4. An instruction to the jury in a criminal case that the testimony of an accomplice is to be "acted upon with the extreme caution" is improper as constituting a comment upon the evidence."

We hold that rule governs here.

10. and 11.

From a careful reading of the record, we find the judgment is not against the manifest weight of the evidence and not contrary to law.

The state's chemist testified that the substance sold was "Cannabis Sativa" commonly knows as marijuana. Appellant argues the state loses unless the witness says the magic letter "L" thereafter, sic, "Cannabis Sativa L". This argument is not well taken. It is clear that the legislature intended by the use of the capital letter "L" after the words "cannabis sativa" to indicate the system of botanical classification.

12.

It is not true in fact that the prosecution at R. 527 or elsewhere, expressed a personal opinion upon the issue of innocence or guilt, or upon the credibility of any witness, nor did he otherwise by his argument, put his own credibility or prestige in the community into the balance.

For the foregoing reasons all twelve assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

Norman J Van Nostran

Paul R. Rutherford

Leland Rutherford

JUDGES.

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA 1108
JEFFERSON DOYLE	:	
Defendant-Appellant	:	
	:	

For the reasons stated in the memorandum on file, all twelve assigned errors are overruled. The judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for the execution of sentence.

Norman J Van Nostran

Paul R. Rutherford

Leland Rutherford

IN THE COURT OF COMMON PLEAS OF TUSCARAWAS COUNTY, OHIO

CASE NO. 10656

JUDGMENT ENTRY ON VERDICT AND SENTENCING

(Filed October 16, 1973)

On the 10th day of October, 1973, this cause came on for trial by Jury and the defendant was present in Court throughout said trial, represented by his Attorneys, James Willis of Cleveland, Ohio, and John James of Akron, Ohio. Prosecuting Attorney Arthur B. Cunningham represented the State of Ohio. Said trial began on the 10th day of October, 1973, and continued through the 15th day of October, 1973.

The Jury, having been duly impaneled and sworn, and having heard the opening remarks of the Prosecuting Attorney for the State of Ohio, and those of Attorney Willis, counsel for the Defendant, the testimony and evidence adduced and submitted by the parties hereto, including exhibits, the arguments of the Prosecuting Attorney and counsel for the defendant, and the charge of the Court, and after due deliberation thereon, finds that said defendant, Jefferson M. Doyle, is guilty of sale of an hallucinogen, as set forth in the Indictment filed against him.

The Court thereupon inquired of either party if there was a request that the Jury be polled as to its verdict, and the defendant having requested that the Jury be polled, each of said jurors was polled as to whether or not this was his or her verdict and said verdict was thereupon confirmed. It is so ordered.

The matter then came on for sentencing. Whereupon the Court inquired of the defendant whether or not he had anything to say why judgment should not be pronounced against him and the defendant having nothing further to say than what he had already said, and the Court having heard the remarks of the Prosecuting Attorney and those of counsel for the defendant, did then and does hereby Order, Adjudge and Decree that the Defendant be sentenced to the Ohio State Penitentiary for a period of not less than twenty nor more than forty (20-40) years, and to remain incarcerated therein until pardoned, paroled or otherwise released according to law.

It is further ordered that the defendant pay the costs herein, taxed at $_____.

It is furthered ordered that a warrant be issued to the Sheriff of this County to convey said defendant to the Ohio State Penitentiary, as provided by law, and that the defendant is hereby remanded to the custody of the Sheriff in accordance with the terms hereof.

/S/ Raymond C. Rice
Judge, Common Pleas Court

APPENDIX "E"

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO : JUDGES:
Hon. Norman Putman, P.J.
Plaintiff-Appellee : Hon. Leland Rutherford, J.
Hon. Paul Van Nostran, J.
vs. :
CASE NO. CA 1109
RICHARD WOOD :
_M_E_M_O_
Defendant-Appellant :
Decided_____
:

FILED
COURT OF APPEALS
JAN 6 1975
TUSCARAWAS COUNTY, OHIO
Robert E. Moore, Clerk

APPEARANCES:

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Counsel for Defendant-Appellant

PUTMAN, P.J.

This appeal is a companion case to No. 1108, Ohio v. Doyle. By agreement of all counsel, both were argued and considered together for the reason that they arise out of a joint indictment and a single transaction and although each appellant had a separate trial, both appellants were represented at trial and here by the same skillful and experienced counsel.

Eleven errors are assigned as hereafter set forth. Because all except Nos. #4 and #7 are the same as in the Doyle case (No. 1108) we set forth for the purpose of convenience the appropriate number given the assignment of error in Doyle.

1. The court erred in failing to grant a change of venue. (Doyle No. 2)

2. The court erred in permitting the State, under the guise of refreshing the witness Griffin's recollection, to show a significant segment of an unsigned written report made by another and different officer. (Doyle No. 4)

3. The court erred in permitting the prosecutor to interrogate the witness Doyle in a manner suggesting his (Doyle's) failure to disclose the substance of his testimony, or to otherwise "protest his innocence," at the time of his arrest was a factor that could properly be considered by the jury in determining his credibility. (Doyle No. 5)

4. The court erred in permitting the prosecution to develope through the testimony of the witness Beamer that the defendant refused to consent to the search of the car.

5. The court erred in permitting the prosecution to develope, through his cross-examination of the defendant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7)

6. The court erred in permitting the prosecution to develope, through the cross-examination of the appellant, that he did not "protest his innocence" upon being arrested. (Doyle No. 7) (Notice this is a repeat)

7. The court erred and the appellant was deprived of a fair trial as a consequence of the following circumstances: Pursuant to Rule 16, the prosecutor informed the defense that no statements (admissions or confessions) were made by either the witness Doyle or the appellant. Despite the apparent reliance of the defense on the prosecutor's response, and in spite of his continuing duty to disclose, the Court allowed the State to show that certain crucial admissions werein fact made.

8. The prosecutor was guilty of misconduct in arguing to the jury that the failure of the witness Doyle, and the appellant, to protest their innocence, or to otherwise disclose their defense, earlier than at the trial, and that their failure to consent to a search of the vehicle, were circumstances that could be weighed in arriving at a verdict in this case (Doyle No. 8)

9. The court erred in failing to give, or appropriately incorporate into its general charge, the special request submitted by the appellant. (Doyle No. 9)

10. The court erred in denying the various motions (including, but not limited to the motion for judgment of acquittal) made at the close of all the evidence. (Doyle No. 10)

11. The verdict of the jury is against the manifest weight of the evidence and is contrary to law. (Doyle No. 11).

Our memorandum in the case of Ohio vs. Doyle, Tuscarawas County No. 1108, is incorporated herein by reference and made a part hereof as fully as if rewritten herein in full. Appellant's counsel concedes the state's case in chief was substantially the same in both cases. Counsel concedes and we find that both trials were conducted substantially the same even though Doyle was tried before Judge Rice and Wood was tried before Judge Spies. We move now to consider each assigned error in turn.

1.

No error appears respecting the refusal of the trial court to change venue. No record of the voir dire examination of jurors was presented us. The record we do have recites merely (R. 11) that:

> "Thereupon a jury was duly impaneled and sworn."

Nothing to the contrary appears.

2.

We find no error in the use by the prosecuting attorney of the report prepared by Capt. Griffin and another, to refresh the recollection of Capt. Griffin upon re-direct examination, taking into consideration the nature of the cross-examination. (R. 272 - 289 of the Wood case)

3.

Here Doyle, not on trial, was called by Wood in the defense case in chief. The cross-examination was not improper for the same reasons stated in the Doyle memorandum respecting assignment No. 5 in the Doyle case.

4.

Here the state called the witness Beamer in rebuttal to rebut statements made by the witness Jefferson Doyle when cross-examined by the prosecutor. Doyle (not on trial) was testifying in defense of Wood having been called by the defense. Doyle volunteered in cross-examination by the prosecutor, details of a conversation between Doyle and Beamer at the time of his first confrontation with the authorities, at the time of the transaction in question, the night both Doyle and Wood were arrested. (R. 425 - 429)

This trial of Wood took place in October of 1973 after the Doyle trial had been conpleted in July of 1973.

No similar incident respecting a clash between the testimony of Doyle and Beamer had developed in the Doyle trial.

We find the testimony of Beamer was proper rebuttal to the testimony of Doyle, and that a proper foundation for the same was laid in cross-examination.

The court held a hearing outside the presence of the jury and found the rebuttal proper. (R. 487). A proper instruction limiting the use of the testimony to the purpose of impeachment of the witness was given (R. 488).

The court properly found the prosecutor had not violated Criminal Rule 16 by not informing the defense of this rebuttal evidence before trial (R. 487).

5.

This assignment raises the same legal point as assignment No. 7 in the Doyle case and is overruled for the reasons given there. This was not evidence used in the state's case in chief but cross-examination for the purpose of affecting credibility.

6.

This assignment is an apparent inadvertent repeat of No. 5 above.

7.

This assignment is preculiar to this case and

did not arise in Doyle's case. The appellant here complains that the prosecutor under Criminal Rule 16, said in writing, August 31, 1973,

> "Defendant made no statements at the time of arrest."

The trial of the case commenced in October, 1973. After the defendant Wood, and co-defendant, not on trial, Doyle, testified for the defense, the prosecutor recalled Kenneth Beamer, who had participated in the investigation and arrest of the defendants. He testified (R. 486-494):

> Q ... At any point subsequent to the time you placed Doyle or Mr. Wood under arrest, did you have an opportunity to have a conversation with Mr. Doyle?
>
> A. Yes, sir.
>
> Q. And when did you have such conversation?
>
> A. After the search of the vehicle some time after 6:00 a.m. in the morning I took him back to the county jail. He rode in my car.
>
> Q. Jefferson Doyle?
>
> A. Yes.
>
> Q. And what was the circumstances of that conversation?

MR. WILLIS: Objection.

THE COURT: You may answer.

A. I stated to Mr. Doyle on the way back, I said Jeff, what are you doing in the dope business, and he said, I don't know, Kenny, I don't know. I stated that I had heard there may be more out on Route 39 in a ditch or culvert...

. . . . . .

A. I said if you have more, Jeff, I want it - I want it all. He said there isn't any more. That is all we had with us.

. . . . . .

Q. So it is fair to say, is it not, Mr. Beamer, that he didn't protest his innocence?

MR. WILLIS: Objection.

THE COURT: He may answer.

A. That is correct, sir.

Q. All right, now, referring your attention specifically to Richard Wood, to this defendant did you have an conversation with the defendant Richard Wood?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. Yes.

Q. And Kenny, did you have an opportunity to have any conversation with the defendant, Richard Wood, at that time and place?

A. Yes sir.

Q. When was that?

A. Just moments after we all arrived at the Tuscarawas County Jail.

Q. Advise us what the nature or circumstances of that conversation was.

MR. WILLIS: Objection.

THE COURT: Overruled.

. . . . . .

THE COURT: He asked you when or if you had any further conversations.

A. Yes.

Q. At the same time?

A. Yes.

Q. What was the nature or circumstances of that conversation?

A. I asked Mr. Wood if he would sign a consent to search his vehicle.

MR. WILLIS: Object and more the answer be stricken and the jury instructed to disregard it.

THE COURT: Now I think this witness has testified to that - permission was not given.

MR. WILLIS: I asked that the jury be instructed that no person is required to give consent and no inference can be drawn from that.

THE COURT: The court will instruct the jury that consent was not given nor is there any reasponsibility that consent should be given under the factual set up in this case.

Q. At any time, Mr. Beamer, did Mr. Richard C. Wood protest his innocence to you?

MR. WILLIS: Objection.

THE COURT: Overruled. You may answer yes or no.

A. No, sir.

Q. Kenny, at any time did Mr. Wood indicate to you that he had or felt he was framed or set up?

MR. WILLIS: Objection.

THE COURT: Overruled.

A. No, sir.

. . . . . .

Q. At any time after the time he was placed under arrest thru the period of the subsequent investigation that morning did Mr. Richard Wood tell you that he was innocent - that he had been set up or framed, or both?

THE prosecutor: Not for that entire period of time.

THE COURT: You may answer yes or no.

A. No, sir he did not. (R. 486-494).

Agent Beamer testified he had not written a summary of his conversation with Doyle and he had not told the prosecutor of his oral statement at the time defendant-appellant requested discovery (R. 496-497) and he further added he only told the prosecutor of the statement on the day before he testified as a rebuttal witness, Thursday, October 4, 1973, the third day of the trial, after he had already testified as a state witness in its case in chief.

We find no showing that the prosecutor was aware of this oral statement to Agent Beamer before the trial of the case. (R. 515-516).

8.

We find the prosecutor was not guilty of misconduct in arguing to the jury the issue of credibility of the witness Doyle and the witness defendant Wood

and pointing to their failure to assert their narratives at the earliest opportunity.

The same reasons apply here as in the eighth assignment in the Doyle case.

9.

The cautionary instruction respecting the testimony of the state's witness Beamer was properly refused. State v. Flonnory, 31 O.S. 2d. 124, paragraph 4 of the syllabus.

10. & 11.

We find from a careful reading of the record that the judgment is not against the manifest weight of the evidence and not contrary to law.

For the foregoing reasons all eleven assigned errors are overruled, the judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

Rutherford, J. and Van Nostran, J. concur.

Norman J. Putnam

Paul E. Van Nostran

Leland Rutherford

JUDGES

IN THE COURT OF APPEALS, FIFTH DISTRICT

TUSCARAWAS COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
vs.	:	CASE NO. CA 1109
RICHARD WOOD	:	
Defendant-Appellant	:	

For the reasons stated in the memorandum on file, all eleven assigned errors are overruled. The judgment of the Court of Common Pleas of Tuscarawas County is affirmed and this cause is remanded to that court for execution of sentence.

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